No. 96-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Supreme Court, U.S.
FILED
1997
CLERK

JAMES FLANAGAN and DAVID H. MIDDLETON,

Petitioners,

vs.

GERALD AHEARN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY, PACIFIC INDEMNITY COMPANY, PLAINTIFF CLASS AND FIBREBOARD CORPORATION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

The following are parents of respondents Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company: CNA Financial Corporation; Loews Corporation. The following are non-wholly owned subsidiaries of respondent Continental Casualty Company: Convida Holdings, Ltd.; Convida Compania de Seguros de Vida, S.A.; Agency Management Services, Inc.

The following are parents of respondent Pacific Indemnity Company: The Chubb Corporation; Federal Insurance Company. There are no non-wholly owned subsidiaries of respondent Pacific Indemnity Company.

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STATEMENT OF THE CASE

This petition is one of two petitions seeking this Court's review of the Fifth Circuit's opinion approving the class action settlement in this case (known as the "Global Settlement"). Respondents Continental and Pacific have filed a brief in opposition to the other petition (*Ortiz v. Fibreboard Corporation*, No. 96-1394) extensively setting forth the factual background of this case. That brief also fully responds to the question the two petitions present in common with respect to the constitutionality of the certification of a non-opt-out class in the circumstances of this case. To avoid repetition, the Court is respectfully referred to that brief in opposition as to those matters, and respondents will confine this brief to the separate question presented only by these petitioners (the "Flanagan Petitioners"): that is, the contention that the Fifth Circuit abused its discretion in determining that the District Judge's recusal was not warranted on the facts of this case.

As detailed below, there is no cause for this Court's review of this factbound contention, which has now been rejected by the District Court (per an independent district judge to whom the recusal issue was referred) and by two separate panels of the Fifth Circuit. Substituting hyperbole about "ill wind[s] of gale force extinguishing . . . the Magna Carta" and the like (Pet. 3) for an accurate description of the underlying facts, the Flanagan Petitioners have grossly distorted the District Judge's exceedingly limited role in the Global Settlement negotiations and the procedural history of this case.

A. The petition misrepresents how this case came before the District Court.

In furtherance of their assertion that the Global Settlement was somehow a creation of the judiciary rather than of the

parties, the Flanagan Petitioners portray the District Judge as having injected himself into matters not properly before him in order to "craft[ ]" a settlement. Pet. 5-7. This portrayal is flatly contrary to the actual facts and the Fifth Circuit's determinations with respect to the origin of this case. App. 4a-15a.*

Summarized briefly, Fibreboard — a former asbestos manufacturer with over $3 billion in current settlement obligations and contingent liabilities to future asbestos claimants, but with non-insurance assets sufficient to pay only a small fraction of that amount — was locked in an extended coverage dispute in the California courts with two insurers, Continental and Pacific. App. 4a-6a, 39a, 243a, 343a. Fibreboard claimed that the insurers owed it no-aggregate-limit insurance coverage on policies issued in the 1950s; the insurers denied that coverage. App. 4a-5a. A Fibreboard loss in this litigation would render future asbestos claims against it, no matter how meritorious, virtually worthless. App. 41a-43a, 323a-324a.

Short of non-insurance funds, and wanting to press Continental into settling the coverage dispute, Fibreboard began a program of "assignment settlements," whereby asbestos claimants would receive an agreed-upon settlement amount, which the claimant would then collect from *Continental* if Fibreboard prevailed in its coverage litigation: in other words, Fibreboard would settle claims against it with "Continental dollars." App. 7a-8a. Asbestos claimants agreed to these terms — since, among other things, they wanted to encourage a settlement of the coverage dispute — but only on the conditions

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* Because the appendix submitted by the Flanagan Petitioners omits several important elements of the decisions below (including the District Court's findings of fact), citations to "App. __" refer to the more complete appendix submitted by the petitioners in *Ortiz v. Fibreboard Corp.*, No. 96-1394.

(1) that Fibreboard obtain court orders validating its right to make these assignments (which Continental strongly disputed); and (2) that the settlement amounts be substantially higher than the previous norm. App. 6a-8a.

In late 1992, Fibreboard entered into a single such assignment settlement of at least 20,000 claims, purporting to assign these claimants the collective right to hundreds of millions of dollars of Continental's money. App. 8a. On January 11, 1993, Fibreboard brought suit against Continental in the District Court seeking the court order insisted upon by the claimants validating Fibreboard's right to make such an assignment and also cutting off any contribution rights Continental might have against Pacific. App. 8a, 269a. In February 1993, Continental's parent, CNA Financial Corporation, announced that Continental had increased its asbestos-related reserve by $1.5 billion and would seek a global resolution of all its asbestos exposure on its Fibreboard policies. App. 9a, 270a. At a status conference several weeks later, Continental informed the District Judge that — while it was willing to seek a settlement — any settlement would have to resolve totally its asbestos exposure under its Fibreboard policies; and counsel for the asbestos claimants advised that they would not negotiate with Continental without Fibreboard's consent. App. 8a-9a, 270a.

Accordingly, the District Judge was hardly the officious interloper described in the petition. To the contrary, before taking a single action with respect to the negotiations that led to the Global Settlement, he had before him a case: (a) asserting the rights of tens of thousands of asbestos claimants to the proceeds of Fibreboard's claimed insurance; (b) whose filing was concededly intended by Fibreboard and the claimants to pressure Continental into seeking an overall resolution of the coverage dispute; and (c) where the defendant, Continental, had informed him that it would be willing to settle only as part of such an overall resolution.

B. The petition misrepresents the District Judge's role in the settlement negotiations.

The petition likewise badly misrepresents the actions the District Judge thereafter took to facilitate settlement. As the Fifth Circuit put it in rejecting the Flanagan Petitioners' similar insinuations below:

> Judge Parker's role in the negotiating process was insubstantial. . . . His actions were limited to appointing Judge Patrick E. Higginbotham of [the Fifth Circuit] as a settlement facilitator, appointing class counsel for the [class] at the recommendation of Judge Higginbotham, receiving regular reports of the negotiations and mediating the global settlement negotiations personally for part of one evening.

App. 55a.

And the petition's description of the events of August 26, 1993 — the "one evening" that Judge Parker was personally involved in the negotiations — is insulting. Pet. 8-10. In particular, the District Judge did not force the parties to settle by, among other things, plying counsel with alcoholic beverages. Pet. 9. Instead, well aware that the California Court of Appeal would hear final argument in the coverage litigation the next day, the parties requested that the District Judge assist them in a "last-ditch effort to reach agreement." App. 12a. The District Judge honored this request, mediating negotiations regarding the parties' remaining differences and providing counsel with a light meal at his home when negotiations extended into the evening after the courthouse closed for the day. App. 12a. As the evidence showed, moreover, when the parties reached the

District Judge's home, they were in fact already in agreement as to financial terms (although that fact was not known by Fibreboard or the insurers), with class counsel engaged in an ultimately successful exercise to extract additional money. App. 293a-294a.*

C. The judiciary did not "script" the Global Settlement.

The Flanagan Petitioners' assertion that several features of the Global Settlement were "scripted" by "an ad hoc 'shadow committee' of federal judges, acting behind-the-scenes to advance some agenda" (Pet. 7) is without merit.

First, there is no record support for the Flanagan Petitioners' allegation that "[t]he judiciary, and not the parties, made the crucial decisions concerning the Rule 23 class action no-opt-out structure of the settlement." Pet. 6. Rather, as the Fifth Circuit observed, all evidence shows that it was *Continental* that insisted upon such a settlement. App. 9a-10a. Indeed, 12 pages later in their own petition, the Flanagan Petitioners affirmatively argue that "[i]t is clear that *Continental's* insistence upon a non-opt-out settlement was the driving force behind the use of Rule 23(b)(1)(B) for a non-opt-out certification." Pet. 18 (emphasis added); *see also id.* (terming Continental "intransigent" on the point).

The few times the Flanagan Petitioners do seek evidentiary support for their charges, they badly distort the record. Thus, Judge Higginbotham's anger at Messrs. Rice and Cox stemmed not from his "faithful[ ] follow[ing] [of] the non-opt-out

* Moreover, while the Flanagan Petitioners complain about the supposed "pressure" the District Judge applied during the negotiations, the only ostensible example they cite is alleged pressure placed on *the insurers* to pay more money (Pet. 9-10): hardly the sort of pressure that *class members* should be upset about.

mandate" (Pet. 6), but from their refusal to comply with his request that — in order to move the negotiations along — they put the reasons for their preference for an opt-out class in writing. App. 278a-279a. Likewise, the District Judge's order appointing counsel to negotiate the prospect of a non-opt-out global settlement (Pet. 8) *postdated* by almost two months the parties' working consensus that a Global Settlement would, indeed, have such a structure. App. 280a-281a.*

Second, the Flanagan Petitioners' portrayal of Judge Higginbotham's ordering the "futures-only" nature of the class on a whim (Pet. 6-7) is based on similar liberties with the facts. As noted above, Judge Higginbotham had been appointed to serve as a mediator in March 1993. In July 1993 — after several months of negotiations towards an all-inclusive class settlement encompassing presents and futures had proven unsuccessful, and with the final appellate argument in the coverage litigation drawing near — he informed the parties that he had come to the view that a combined presents and futures settlement was "too complex," and that the class should instead be limited to "futures," with Continental settling present claims separately.

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* Finally — in light of the fact that the District Judge had on a number of prior occasions publicly set forth his view that, in an appropriate case, the law permitted a non-opt-out settlement to be crafted under Rule 23(b)(1)(B) — it is hardly surprising that Continental's counsel, who was firmly committed to such a course, would have invoked these expressions of opinion during the course of debate. Pet. 5-6. But that is a far cry from the District Judge's having, as the petition insinuates, "mandate[d]" that the parties proceed on that basis. Moreover, Mr. Cox, who attended the March 10, 1993 status conference (of which no transcript was taken) at which the Flanagan Petitioners (who did not attend the conference) contend that the District Judge instructed that a Rule 23(b)(1)(B) class settlement be negotiated, testified that the District Judge said no such thing. *See* JA7:1093 (citations to "JA" refer to portions of the joint appendix in the Fifth Circuit not included in the petitioners' appendix).

App. 282a-283a. The parties each recognized that this recommendation had merit (App. 283a-284a, 374a),* and agreed to it. This was hardly an inappropriate role for a court-appointed mediator to play: as even the dissent below acknowledged, "[c]ertainly there can be no criticism of Judge Higginbotham's role. . . . In facilitating agreement, he did precisely what a mediator is supposed to do." App. 119a n. 52.

Moreover, contrary to the Flanagan Petitioners' insinuations, this recommendation worked to the *advantage* of the class. It allowed class counsel to use negotiations regarding present claims as a benchmark in order ultimately to achieve higher settlement values for the class than would otherwise have been attainable. App. 374a.**

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* Among other things, a class settlement involving presently pending claims would have raised issues under the Anti-Injunction Act, 28 U.S.C. § 2283. It is in no way inappropriate, moreover, that Judge Higginbotham — acting as settlement facilitator — may have discussed these issues with some of his colleagues prior to informing the parties of his views. Pet. 7. Finally, the limitation of the class to "futures" did not somehow insulate the Global Settlement from objection, as the dissent below claimed: (1) though this is a "futures" class, a "future" claimant is defined as any person who had not *filed a claim* against (or settled with) Fibreboard prior to August 27, 1993, and there are thus tens of thousands of class members with currently manifest injuries; and (2) there is a highly organized and motivated plaintiff's asbestos bar, members of which would not have hesitated to object if they thought the Global Settlement were unfair or otherwise inimical to class members' interests.

** The negotiations regarding present claims revolved principally around the massive assignment settlement whose validity Fibreboard had originally filed suit to establish. *See* p. 3, *supra*. Because these negotiations were thus taking place off of inflated "assignment" values, class counsel was in the enviable position of: (a) negotiating an agreement for present claimants off of inflated "assignment" values; and then (b) understandably insisting that they could not possibly accept less for the futures class. App. 374a.

D. The petition misrepresents the fairness hearing proceedings before the District Court.

The Flanagan Petitioners also take out of context the District Judge's comments at the August 27th and September 9th hearings immediately following the reaching of an agreement in principle with respect to a Global Settlement. Pet. 10-12. There is no question that the District Judge's understandable reaction to the parties having at the eleventh hour succeeded in reaching an agreement in principle, resolving a fifteen-year-old coverage dispute and establishing a multi-billion-dollar fund for asbestos claimants, was one of approbation. This is hardly surprising.

But that in no way suggests that the District Judge's mind was closed on the matter: that, as the petition claims, he "failed to recognize that class members have a right to lodge objections to a proposed settlement; [and] that the assigned judge must pass upon those objections before a class settlement may be finalized." Pet. 25. To the contrary, the District Judge's tentative expressions are analytically indistinct from the preliminary approval of a class settlement that is *required* under the Rules in advance of any fairness hearing. *See* Manual of Complex Litigation § 30.44, at 229 ("A two-step process is followed when considering class settlements. First, the court makes a preliminary evaluation of the fairness of the settlement. . . .").

There is *no* evidence that the District Judge had made anything more than the contemplated "preliminary evaluation." To the contrary:

- At the August 27 hearing, class counsel, speaking for all parties, stated quite clearly the parties' understanding that "this deal is completely contingent upon Court approval and the Court's

complete investigation of the deal on all issues that the Court deems appropriate" (JA71:5);

- In granting a preliminary injunction on September 28, 1993, the District Judge explicitly stated that he was not "prejudging the outcome of an application for approval of the settlement based on a fully developed record," and that he would not at that "juncture predict with certainty what actions it will take following a fairness hearing — where all issues and objections can be addressed on a full record" (JA141:7, 12);

- the District Judge thereafter appointed a guardian *ad litem* to make an independent assessment of the Global Settlement from the standpoint of the Class and to advise the Court as to the Settlement's fairness (App. 14a, 398a-399a);

- the District Judge ordered comprehensive notice materials disseminated in what proved to be an $18 million worldwide mail, television and newspaper notice campaign, the most expensive such campaign ever (App. 419a-426a);

- the District Judge stated that he "welcome[d]" intervention motions as helping to "insur[e] that the Court will have a full record with all of the 'pros' and 'cons' relating to the fairness, reasonableness and adequacy of the proposed settlement — to assist the Court in its ultimate decision in this case" (JA112:5-6);

- the District Judge granted intervenors, including the Flanagan Petitioners, extremely broad discovery,

including depositions of the lawyers who negotiated the settlement and production of over 20,000 pages of documents; and

- the District Judge then conducted a comprehensive eight-day fairness hearing, giving the Flanagan Petitioners (and all other intervenors) full cross-examination rights and the broadest latitude to offer evidence and argument.

Finally, even subsequent to the fairness hearing, the District Judge raised an express question as to whether he would approve the Global Settlement unless certain changes were made in the Trust administration rules — changes which were indeed then made by the parties. App. 391a-393a. In sum, there is absolutely nothing in the record that supports the Flanagan Petitioners' charges of bias; indeed, none of the other intervenors have ever raised that claim or sought the District Judge's recusal.

E. The Flanagan Petitioners do not accurately describe the proceedings below regarding their recusal motion.

The petition's one-paragraph description of the procedural history of its recusal motion (Pet. 12-13) omits several pertinent facts. *First*, contrary to the implication in the petition, the District Judge did not himself deny that motion. Rather, he leaned over backwards to refer the motion to *another* District Judge (Judge William M. Steger). Judge Steger found — "[o]n the basis of the entire record" — that "no reasonable person would conclude that Judge Parker is biased and no reasonable person would harbor doubts about his impartiality." *Ahern v. Fibreboard Corp.*, 6:93cv526 (E.D. Tex., Jan. 10, 1994) at 2.* *Second*, the Flanagan

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* Subsequently, when the Flanagan Petitioners renewed their recusal motion at the fairness hearing itself, Judge Parker denied the motion himself.

Petitioners then sought mandamus from the Fifth Circuit, which a panel comprised of Judges Davis, Duhe and Jones denied without opinion. *See In re Tillman*, No. 94-40301 (5th Cir., June 22, 1994).* *Finally*, in the decision below, the Fifth Circuit conducted its own "review of the record"; determined that "Judge Parker's role in the negotiating process was insubstantial"; and "confirm[ed]" Judge Steger's finding that "Judge Parker carefully avoided any appearance of impropriety." App. 55a.

REASONS FOR DENYING THE WRIT

The petition's factbound claim that the courts below abused their discretion in determining that the District Judge's recusal was not required under 28 U.S.C. § 455 does not warrant review by this Court. The decision below was a plainly correct application of settled law, and no conflict among the circuits is even alleged.**

1. In *Liteky v. United States*, 510 U.S. 540 (1994), this Court addressed the legal standard applicable to recusal claims under 28 U.S.C. § 455. The Court held that such claims are subject to the "extrajudicial source doctrine," under which "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at

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* Judge Jones, while joining in the denial, would have left the issue to be "aired on direct appeal." *Id.*

** As noted above, the question raised in the petition regarding the constitutionality of the certification of a non-opt-out class — and the petition's erroneous claim of a circuit conflict regarding that question — is addressed in respondents Continental's and Pacific's brief in opposition in *Ortiz v. Fibreboard Corp.*, No. 96-1394.

555. Likewise, under that doctrine, a "judge's view of the law" derived from sources such as scholarly reading does not suffice as a basis for "bias or prejudice" recusal. *Id.* at 554. Applying this standard, the court below determined that recusal was not warranted. App. 54a-55a.

2. Although the petition omits mention of *Liteky*, its crux is a factbound claim that the court below misapplied the *Liteky* standard. It alleges no confusion or conflict in the lower courts about *Liteky's* meaning or how it is to be applied. There is thus no cause for this Court's review.

In addition, the decision below was a plainly correct application of *Liteky*. The Flanagan Petitioners principally allege that the District Judge was biased as a result of his participation in settlement negotiations; however, since such activity is clearly a proper judicial function — and is not "extrajudicial" in nature — that participation could supply grounds for recusal only if "opinions formed" by the District Judge in the course of it "display[ed] a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. And when the actual underlying facts about the District Judge's "insubstantial" role in the negotiations (App. 55a) — rather than the petition's colorful, but inaccurate, description of them — are considered, it is clear that the District Judge "display[ed]" no such thing. To the contrary, as the Fifth Circuit determined, he "carefully avoided any appearance of impropriety." App. 55a.

Indeed, the lower courts have regularly recognized the propriety of a judge's participation in settlement negotiations, and have regularly voiced approval of far more extensive participation than the District Judge's here. *See, e.g., Ackerman v. Kassar*, 5 F.3d 534 (table), 1993 WL 326453, *2-*4 (9th Cir. Aug. 26, 1993); *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 733 (2d Cir. 1992); *Wheeler v. Southland Corp.*, 875

F.2d 1246, 1251-52 (6th Cir. 1989); *Franks v. Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986); *Geneva Assurance Syndicate Inc. v. Medical Emergency Serv. Assoc. (MESA) S.C.*, 1993 WL 384566, at *3-*4 (N.D. Ill. Sept. 28, 1993); *United States v. Conservation Chem. Co.*, 106 F.R.D. 210, 234 (W.D. Mo. 1985); *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913, 9[illegible]-26 (D. Nev. 1983).

Moreover, the Flanagan Petitioners' claims are likewise meritless to the extent they are based on: (a) the District Judge's prior statements of his view that, in an appropriate case, the law permitted a non-opt-out settlement to be crafted under Rule 23(b)(1)(B); and (b) his provision of his home to the parties as an informal venue for further negotiations when the courthouse was to close on the night before the final argument in the coverage litigation. The former represent only the "judge's view of the law" (*Liteky*, 510 U.S. at 555); the latter is hardly a basis for the judge's disqualification. *See In re Beard*, 811 F.2d 818, 828-29 (4th Cir. 1987) (judge's invitation to president of product liability defendant to meet at judge's home to discuss whether defendant planned to file for bankruptcy was not improper).

3. Nor is there any cause for this Court to address the Flanagan Petitioners' novel and completely unsupported argument for "an automatic *per se* rule of recusal" in class proceedings whenever the judge has any involvement whatever in settlement negotiations. Pet. 20. The petition cites no authority that even remotely supports this position, nor does it explain why such a draconian rule is needed. Indeed, it principally relies on 28 U.S.C. § 455 — which, as set forth above, this Court construed in *Liteky not* to state any such "automatic *per se* rule of recusal."

Instead, all authorities reject the Flanagan Petitioners' "*per*

se rule," recognizing the useful and often necessary role that judges can play in the settlement process. *See Ackerman*, 5 F.3d 534 (table), 1993 WL 326453 at *3-*4; *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 733 (2d Cir. 1992); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1543 (11th Cir. 1987); *Bilello v. Abbott Labs.*, 825 F. Supp. 475, 481 (E.D.N.Y. 1993); *In re Fernald Litig.*, 1989 WL 267039, at *1 (S.D. Ohio. Sept. 29, 1989); *see also United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co.*, 447 F.2d 647, 655 (7th Cir. 1971) ("The soundness of the district court's conclusion of approval or disapproval may also be determined by a consideration of the court's knowledge of the case drawn from pre-trial conferences . . ."); Manual for Complex Litigation §§ 23.11, 30.44 (recognizing that a judge may participate in class action settlement negotiations even though the judge will ultimately have to pass on the settlement's fairness). As the Second Circuit stated:

> A judge with responsibilities for a lawsuit is not a bystander. Nor is the judge relegated to the role of umpire, awaiting the submission of precisely framed disputes by the parties. Especially in the course of a complex and continuing proceeding such as a bankruptcy reorganization, a judge has an entirely legitimate judicial role in suggesting constructive solutions and assisting the parties in achieving them.

In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d at 733.* The

* *See also In re Dennis Greenman*, 829 F.2d at 1543 (appellate court can draw comfort from fact that court that passed on settlement's fairness "itself participated in the settlement process"); Fed. R. Civ. P. 16(a)(5) (expressly authorizing the judge to take actions "facilitating the settlement of the case"); *Fong v. American Airlines*, 431 F. Supp. 1334, 1339 (N.D. Cal. 1977) (judicial involvement in settlement process is an "absolute necessity in the federal judicial system").

Flanagan Petitioners are thus challenging settled law and sound policy, and their effort to do so does not call for this Court's review.

CONCLUSION

For the reasons given above, and for those given in respondents Continental's and Pacific's brief in opposition in *Ortiz v. Fibreboard Corp.*, No. 96-1394, the petition should be denied.

Dated: March 31, 1997

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